IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1404, Misc.

DO-RIGHT AUTO SALES, TIMOTHY O'BRIEN, THOMAS O'BRIEN, d/b/a DO-RIGHT AUTO SALES, Individually and on behalf of all others similarly situated,

Petitioners,

vs.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, and each Circuit Judge in regular active service thereon,

Respondents.

PETITIONERS' MEMORANDUM IN REPLY TO THE SEVENTH CIRCUIT'S BRIEF IN OPPOSITION

MORTON E. FRIEDMAN
134 N. LaSalle Street
Chicago, Illinois 60602
(312) 332-1860

THEODORE M. BECKER
J. SAMUEL TENENBAUM
134 N. LaSalle Street
Suite 300
Chicago, Illinois 60602
(312) 372-2192

Counsel for Petitioners

Of Counsel:
BECKER & TENENBAUM

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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PETITIONERS' REPLY TO JURISDICTIONAL STATEMENT OF THE SEVENTH CIRCUIT'S BRIEF

The Seventh Circuit's Brief Misconstrues The Nature Of The Relief Sought By Petitioner.

The Seventh Circuit's Brief posits two situations in which litigants might request this Court to mandate the convening of a three-judge district court: where a

single judge has acted[1] and where action is imminent.[2] The attempted distinction is tenuous and, in any event, inapplicable to this case. Petitioners do not seek from this Court an order directing the convening of a three-judge court. Petitioners argue merely that the Seventh Circuit should permit citation of *Valentino v. Lynch* and deal accordingly with that opinion.

Nowhere in its brief does the Seventh Circuit dispute Petitioners' contention (set forth as Point II of the Petition) that, if relief is to be accorded Petitioners in a judicial forum, it is available only in this Court. Accordingly, writs of mandamus and prohibition are appropriate. Petitioners challenge the procedure by which the Seventh Circuit considered the mandamus petition presented to it. Such a challenge justifies extraordinary relief. Any argument concerning the appropriateness of mandamus or prohibition writs vis-à-vis certiorari is, as the Seventh Circuit recognizes (in footnote 3 of its Brief), in large part academic. This Court, in its discretion, frequently has treated petitions for mandamus or prohibition as petitions for certiorari. Petitioners maintain, however, that mandamus and prohibition are appropriate writs in this case.

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[1] *Ex Parte Northern Pac. R. Co.*, 280 U.S. 142 (1929); *Ex Parte Cogdell*, 342 U.S. 163 (1951)—actions challenging constitutionality of legislation dismissed by a single judge as against contentions that three-judge courts were required.

[2] In the instant case, the single district judge already has denied Petitioner's Motion to Convene a Three Judge Court, and a Motion to Dismiss has been filed (but not yet briefed by Howlett).

PETITIONERS' REPLY TO POINT I OF THE SEVENTH CIRCUIT'S BRIEF

Respondents Would Have This Court Declare The Underlying Lawsuit Dismissed, Although The Defendant Howlett Has Yet To Brief His Motion To Dismiss, Which Has Been Pending In The District Court These Past Thirteen Months.

The crux of Respondent's "mootness" argument focuses upon an affidavit filed, not in the district court, but for the first time in the Court of Appeals. The affidavit essentially states that no matter what the challenged statute provides or fails to provide on its face, Howlett's administration interprets and administers it in a constitutional manner.

Petitioners' license to operate their auto sales dealership was revoked July 2, 1975, without prior notice or hearing. Subsequently, Petitioners, through their counsel, spoke with officers and administrators of the Illinois Secretary of State's office in an attempt to obtain rescission of the revocation order pending a formal hearing. Howlett's office refused this relief. Only upon such refusal did Petitioners institute their federal court action. At no time during the July 23, 1975, argument on Petitioners' Motion for a Temporary Restraining Order did Howlett's counsel allege that the revocation without prior hearing had been a mistake. Upon the entry of the restraining order Jay L. Mesi (the affiant) restored the license, and during conversations with Petitioners' counsel, he at no time indicated that the revocation without prior hearing had been a mistake. Between July, 1975, when the restraining order was granted, and January, 1976, when the mandamus petition was filed in the Seventh Circuit, various proceedings in this case were conducted in the district

court. At no time, verbally or in written memoranda, did Howlett during those six months contend that the revocation without prior hearing had been a mistake! Only after the mandamus petition was filed in the Seventh Circuit, and Howlett obtained new counsel (the Illinois Attorney General's appellate division), did Jay L. Mesi execute and submit the affidavit.

The challenged statute, unlike other Illinois statutes providing for license suspension or revocation, contains no provision for a prior hearing. The grounds upon which Petitioners' auto dealer's license was revoked without prior hearing (alleged failure to post hours of business and alleged failure to maintain certain records) certainly cannot purport to have constituted a public emergency. Yet, in order to obtain a hearing without the disadvantage of being precluded from operating their business pending the administrative proceedings, Petitioners were forced to incur the expense and burden of instituting a federal lawsuit.[3]

Petitioners have brought this suit as a class action. While Howlett may restore a revoked license pending hearing to auto dealers who win federal court restraining orders, the statute is not rendered constitutional nor its effect on the class of auto dealers less burdensome thereby.

[3] While Respondents accuse Petitioners of "dilatory tactics," it should be noted that no representative for Howlett has bothered to appear in the district court for status calls during the past several months and that Howlett has not yet submitted a memorandum in support of the Motion to Dismiss he filed over one year ago. Rule 13 of the Northern District Rules requires the submission of such a memorandum, and Howlett, by Motion filed by Petitioners, has been on notice of the necessity for a memorandum these past eleven months.

PETITIONERS' REPLY TO POINT II OF THE SEVENTH CIRCUIT'S BRIEF

There Exist Strong Indications That The Rule Forbidding Citation Of Unpublished Opinions Has Not Been Well Received By Responsible Groups And Members Of The Bar.

Although the rule Petitioners challenge is part of a plan characterized by the Seventh Circuit's Brief as "experimental,"[4] the rule has been in effect over 3 1/2 years. During this time the rule, on the average, has been applied to at least fifty percent of all opinions issued by the Seventh Circuit.[5]

The Chicago Bar Association has issued a report critical of the nonpublication/noncitation rule. Petitioners have been informed that, in this case, the Solicitor General and the Civil Division of the Justice Department, because of their opposition to the challenged rule, declined to represent the Seventh Circuit. A similar Ninth Circuit rule has been critized in an American Bar Association publication.[6]

[4] The challenged rule and the plan of which it is a part lacks the fundamental requisites of an experiment, such as randomization and control. The rule and plan fail to set forth any recognizable method whereby internal validity (the *sine qua non* of any experiment) can be evaluated. "Internal validity is the basic minimum without which any experiment is uninterpretable: Did in fact the experimental treatment make a difference in the specific experimental instance?" D. CAMPBELL AND J. STANLEY, EXPERIMENTAL AND QUASI EXPERIMENTAL DESIGNS FOR RESEARCH 5 (1973). The nonpublication/noncitation "experiment" has no clearly defined duration and has many unwilling participants.

[5] Hastings, *The Seventh Circuit Plan For Publication of Opinions—A Continuing Experiment*, 51 Ind. L.J. 367, 371-373 (1976).

[6] Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?* 61 A.B.A.J. 1224 (1975).

It is impermissible to minimize the application of the challenged rule. Not only has the rule been applied in a great number of cases, it has been applied to quite lengthy opinions addressing a multiplicity of issues. Should this Court grant Petitioners' Motion for Leave to File the Petitions, and order further briefs, Petitioners are prepared to document, in detail, numerous instances in which opinions covering eight to fifteen typewritten pages, each addressing several well-briefed issues (some issues of first instance within the Circuit), were ordered not to be published or cited.

Petitioners assert that the judicial process is offended when a Court prepares one set of opinions for public scrutiny and another set for the purposes of a select few.[7] Petitioners emphasize that they do not raise any issue as to whether Circuit Judges should prepare written opinions. Petitioners merely contend that every opinion written should become part of the public law of the Circuit.

It does not follow, "by definition," as asserted in the Seventh Circuit's brief, that because it is within the province of judges to overrule and modify their prior decisions, it also is within their province to determine, prospectively, whether a given decision has value as precedent for future cases.

Circuit Courts of Appeals do not create law in a regional vacuum. This Court frequently bases its determination to review an issue based on the existence of a conflict between the Circuits. Petitioners' counsel have recognized instances in which Petitions for Certiorari

[7] This summer's amendment to the nonpublication/noncitation rule does not cure the basic objections to the rule, nor does it resolve the issues raised by these Petitioners.

have been brought before this Court by litigants within other Federal judicial circuits, unaware, because of the nonpublication/noncitation rule, that the issue they raised before their Circuit had been ruled upon by the Seventh Circuit in a conflicting manner. The impairment of ready access (via indexing systems and reporters) to the substance of unpublished opinions undermines this Court's reviewing power. Rules promulgated by the Circuit Courts of Appeal should prudently address themselves to procedures whereby the intent of the Federal Rules of Appellate Procedure can best be carried out in each Circuit. Local circuit rules should not modify or eliminate basic judicial functions or serve to impair further judicial review.

CONCLUSION

For the reasons expressed in the Petition, the Reply to Michael J. Howlett's Brief and this Reply to the Seventh Circuit's Brief, Petitioners pray this Court grant the Motion for Leave to File the Petition and grant the relief requested in the Petition.

Respectfully submitted,

MORTON E. FRIEDMAN
134 N. LaSalle Street
Chicago, Illinois 60602
(312) 332-1860

THEODORE M. BECKER
J. SAMUEL TENENBAUM
134 N. LaSalle Street
Suite 300
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